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No. 08-878

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In The

Supreme Court of the United States

GABRIEL CRUZ-GARCIA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This Court should grant Petitioner's petition for writ of certiorari to correct the misapplication of this Court's retroactivity analysis by the Ninth Circuit Court of Appeals, as well as by other circuit courts, and also to resolve the conflict among the circuits in regard to the issue of whether lawful permanent residents who are removable on the basis of a conviction by jury trial, and who remained, even after the conviction, statutorily eligible for relief from removal under the then-existing 8 U.S.C. § 1182(c) (known as "§ 212(c)") relief, and who now face removal proceedings initiated after the repeal of the statute, continue to remain eligible for that relief. Respondent has failed to rebut Petitioner's arguments that he remains eligible for § 212(c) relief and that no showing of reliance or *quid pro quo* agreement is required in order to show retroactive effect under this Court's well-established retroactivity analysis.

1. Respondent's assertion that the issues raised in Petitioner's petition do not warrant this Court's review is without merit. Respondent argues that this Court should deny Petitioner's request to consider whether or not persons rendered removable on the basis of pre-AEDPA (Anti-terrorism and Effective Death Penalty Act), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), and pre-IIRIRA (Illegal Immigration Reform and Immigrant Responsibility Act), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), convictions remain eligible for relief from

removal under § 212(c), on the basis that (1) the lower court did not decide that issue in this case and (2) a petition for re-hearing en banc filed by the petitioner in *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc) is pending before the Ninth Circuit Court of Appeals. Res. Opp. at 5.

These contentions are without merit. First, this Court has jurisdiction to consider an issue that was not presented below. *See Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). Though the Court does not ordinarily do so, "the rule is not inflexible" and the Court will review questions not pressed or passed upon below in exceptional cases. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Petitioner presents an exceptional case. The *Abebe* decision was issued on November 20, 2008, subsequent to the issuance of the lower court's Memorandum decision denying Petitioner's petition for review, and the same date on which the lower court denied his petition for rehearing en banc. Therefore, Petitioner simply did not have any opportunity to challenge *Abebe* before the court below. Yet, the lower Court's holding in *Abebe* is dispositive in Petitioner's case because he is seeking relief from removal under § 212(c). Thus, even if this Court granted Petitioner's petition and decided the retroactivity issue in his favor, he would nonetheless remain ineligible for § 212(c) relief if the *Abebe* decision is allowed to stand. The same would be true for all other similarly situated individuals seeking relief from removal who reside within the

jurisdiction of the Ninth Circuit Court of Appeals. Thus, this Court's review is warranted.

Second, this Court clearly has jurisdiction to grant the writ of certiorari notwithstanding the fact that *Abebe* is still pending before the Ninth Circuit on petition for rehearing. Furthermore, the legal questions raised by *Abebe*, which have given rise to a circuit split and represent an extraordinary departure from over 60 years of agency and judicial precedent, are of extreme importance and are ripe for review by this Court. Thus, the Respondent's argument that this Court's review of the issues raised by *Abebe* would be "especially premature" is unavailing. Res. Opp. at 5.

2. The Respondent's arguments that the Ninth Circuit Court of Appeals and other circuit courts have correctly imposed a reliance requirement onto the retroactivity analysis established by this Court are unconvincing.[1] As discussed in detail in the petition (Cert. Pet. at 17-26), this Court has never held that reliance on prior law is required to determine whether a statute may be applied retroactively. Cert. Pet. at 17-26. As discussed in the petition, this Court

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[1] Respondent attempts to diminish Petitioner's arguments regarding the retroactive effect of the statutory repeal of § 212(c) by noting the fact that the repeal occurred 12 years ago. Res. Opp. at 6. However, the issues before this Court continue to impact thousands of individuals (Cert. Pet. at 6-7) and therefore merit review.

did not impose a reliance requirement in *INS v. St. Cyr*, 533 U.S. 289 (2001). Cert. Pet. at 25.

Furthermore, the Respondent's arguments that this Court "confirmed the importance of reliance" in retroactivity analysis in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006) are without basis, as it is clear that the Respondent has misconstrued the Court's holding in that case. Indeed, the Court's reasoning in *Fernandez-Vargas* supports rather than detracts from Petitioner's position that a statute has retroactive effect simply if it attaches new consequences or liabilities to a past act or event which cannot be undone, irrespective of any affirmative reliance on prior law. Cert. Pet. at 24.

In support of its contention that the Court in *St. Cyr* imposed a reliance or *quid pro quo* requirement, the Respondent refers to dictum in *Fernandez-Vargas*, in which the Court simply states the fact that the *St. Cyr* Court emphasized the *quid pro quo* nature of the plea bargain in determining whether the repeal of § 212(c) had a retroactive effect as applied to an individual who had pled guilty to an offense rendering him removable. Res. Opp. at 7-8 (*citing Fernandez-Vargas*, 548 U.S. at 43-44). This reference does not support the Respondent's position, however, because the holding in *Fernandez-Vargas* did not turn on the issue of whether or not the petitioner had taken an affirmative step to avail himself of discretionary relief, or otherwise enhance the significance of such relief to himself in particular, prior to the effective date of the reinstatement provisions. *See*

Fernandez-Vargas, 548 U.S. at 44; *see also id.* at n.10. Rather, the Court in *Fernandez-Vargas* recognized that a statute has retroactive effect if it attaches new consequences to past acts and held that the reinstatement provisions did not have retroactive effect as applied to *Fernandez-Vargas* because the new law does not penalize the actual act of reentry, but rather creates a removal process to be initiated at *any time* after reentry, and thus it is "the alien's choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous regime, not a past act that he is helpless to undo . . . " *Id.*

As such, contrary to the Respondent's assertion, the Court in *Fernandez-Vargas* did not "confirm the importance of reliance" in retroactivity analysis by making reference to the *quid pro quo* agreement in *St. Cyr*, but rather used that agreement as an example of a single past act to which new legal consequences subsequently attached, as opposed to Fernandez-Vargas' ongoing choice to remain in the country, both before and after the passage of the new law. *Id.* This holding is consistent with the holdings in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Martin v. Hadix*, 527 U.S. 343, 360 (1999); and *Hughes Aircraft Company v. U.S. ex rel. Schumer*, 520 U.S. 939, 951-952 (1997), where this Court held in each case, respectively, that the presumption against retroactivity was applicable because a new legal burden was being imposed on

past conduct or events which could not be undone. Similarly, in this case, the past act or event to which IIRIRA has attached a new legal consequence is Petitioner's conviction; the repeal of § 212(c) "did not attach any different legal consequences to a conviction based on a bargained plea that it did to a conviction following trial." *See Atkinson v. Attorney Gen. of the United States*, 479 F.3d 222 (3rd Cir. 2007). Thus, this Court's reasoning in *Fernandez-Vargas* supports a finding that the repeal of § 212(c) has a retroactive effect as applied to Petitioner.

In addition to misreading *Fernandez-Vargas*, the Respondent also mischaracterizes the split among the circuits regarding the issue of whether persons convicted at trial remain eligible for § 212(c) relief. Respondent characterizes the split as being "quite narrow," noting that nine of the circuits "have declined to extend the holding of *St. Cyr* generally to aliens convicted after going to trial rather than pleading guilty." Res. Opp. at 8. However, the Respondent itself recognizes that there are numerous inconsistencies among the circuits regarding the issue of whether reliance is "a significant factor to be considered for purposes of retroactivity analysis" and acknowledges that reliance "may be given different weight in different circuits and there is variation about whether it must be actual or objectively reasonable reliance." Res. Opp. at 6. What Respondent fails to acknowledge is that the circuit split regarding the issue of reliance in retroactivity analysis has caused some circuits to hold that § 212(c) relief remains

available to aliens who were convicted by jury at trial prior to the law's repeal, while others have reached the opposite result. *See Hem v. Maurer*, 458 F.3d 1185, 1200 (10th Cir. 2006). Thus, contrary to Respondent's argument, there exists a pronounced split among the circuits regarding the issue of whether persons who are removable on the basis of a conviction by jury trial, and who remained, even after the conviction, statutorily eligible for relief from removal under the then-existing 8 U.S.C. § 1182(c) relief, and who now face removal proceedings initiated after the repeal of the statute, continue to remain eligible for that relief.

The inconsistencies among the circuits on this issue are in turn rooted in the respective courts' erroneous imposition of a reliance requirement. Because the imposition of a reliance requirement effectively shoulders the applicant with the burden of proving that a statute has a retroactive effect as applied to him, it is by definition antithetical to the *presumption*[2] *against* statutory retroactivity established by this Court and consequently has led to much confusion, judicial inefficiency, and arbitrary results among the circuits.

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[2] As defined in Black's Law Dictionary, "A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." *Black's Law Dictionary* 549 (2nd Pocket Ed. 2001).

Respondent's discussion in section 2c of its opposition highlights this fact. For example, the Respondent points to the case in *Hem*, where the Tenth Circuit Court of Appeals held that Hem, who was convicted at trial, was eligible for § 212(c) relief because he made an objectively reasonable decision to forgo a right to appeal that would have put him "at risk of being sentenced to a sentence longer than 5 years . . . making him ineligible for § 212(c) relief." *Hem*, 458 F.3d at 1199. Respondent argues that Petitioner's case is distinguishable because in 1979 Petitioner would not have been exposed to such risk because the five-year-imprisonment ceiling was not added to § 212(c) until 1990, and thus, Respondent argues, Petitioner cannot demonstrate "reasonable reliance." Res. Opp. at 11 n.5. Assuming arguendo that Respondent's argument is valid, this juxtaposition only serves to expose the "reliance requirement" as artificial and irrelevant as to the question whether the repeal of § 212(c) has a retroactive effect as applied to any particular individual. The repeal of § 212(c) has no less retroactive effect as applied to Petitioner, who was convicted of his removable offense in 1979, than it does to Hem, who happened to be convicted more recently, but prior to the repeal of the statute.

Respondent points to further, more egregious distortions of this Court's retroactivity analysis, citing to *Wilson v. Gonzales*, 471 F.3d 111 (2nd Cir. 2006), *Carranza-de Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007) and *Mbea v. Gonzales*, 482 F.3d 276 (4th

Cir. 2007). In *Wilson* and *Carranza-de Salinas*, the Second Circuit and the Fifth Circuit, respectively, held that would-be § 212(c) applicants must make an *individualized, subjective showing of actual reliance* on the availability of such relief prior to its repeal. *See Wilson*, 471 F.3d at 122 *and Carranza-de Salinas*, 477 F.3d at 205. The Fourth Circuit in *Mbea* goes even further by requiring the existence of a *quid pro quo* agreement. *See Mbea*, 482 F.3d at 281-282. These evidentiary requirements effectively render the "presumption" against statutory retroactivity meaningless by shifting the evidentiary burden to the applicant.

Moreover, Respondent's arguments bring to light the fact that there are even intra-circuit inconsistencies regarding the "reliance requirement." Res. Opp. at 9 n.3. One such conflict exists within the Ninth Circuit, where that Court held in *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002) that a *quid pro quo* agreement is required and then subsequently held in *Hernandez de Anderson v. Gonzales*, 497 F.3d 927 (9th Cir. 2007), that an applicant need only demonstrate objectively reasonable reliance. While this Court does not sit to resolve intra-circuit disputes, the above example serves to further illustrate the general confusion and inefficiency which have arisen from the erroneous imposition of a reliance requirement onto the retroactivity analysis framework and thus further underscores the need for this Court's intervention.

3. Respondent contends that the Third Circuit Court of Appeals in *Atkinson*, 479 F.3d at 230 n.7,

"acknowledged" that a person who had not acquired seven years of unrelinquished domicile as of the date of his conviction "might be precluded from relief under Section 212(c)." Res. Opp. at 10. This is a misstatement of the Court's discussion. In a footnote, the Court noted the government's argument that stop-time provisions enacted as part of IIRIRA, interrupted the accrual of Atkinson's unrelinquished domicile and then expressed its disagreement, stating "we are inclined to believe that [stop-time provisions] apply *only* to cancellation of removal, 8 U.S.C. § 1229b(d)(1), and *not* to aliens seeking a discretionary waiver under former section 212(c)." *Id.* (emphasis added).

4. In opposing Petitioner's alternative argument that he could establish reasonable reliance, Respondent conflates objectively reasonable reliance with individualized, subjective reliance (Res. Opp. at 11-13), contending that Petitioner cannot show reasonable reliance because he has not made an individualized showing of any affirmative step he took in reliance on the availability of § 212(c) relief. Unlike a subjective, actual reliance requirement, objective reliance does not require the applicant to produce evidence of reliance; rather, the applicant can demonstrate objective reliance if the Court can conclude that it would have been reasonable under a particular set of circumstances for the applicant to rely on the availability of § 212(c) relief. *See Hernandez de Anderson*, 497 F.3d at 940; *Hem v. Maurer*, 458 F.3d at 1199; *Ponnapula v. Ashcroft*, 373 F.3d 480 (3rd Cir. 2004).

Respondent contends that Petitioner cannot demonstrate a "viable claim" of objective reliance on the availability of § 212(c) relief on the basis of its contention that it is not reasonable to conclude that Petitioner delayed affirmatively applying for § 212(c) relief in reliance on its continued availability for the purpose of accumulating greater equities over time, citing the fact that Petitioner's conviction occurred 17 years prior to the repeal of § 212(c). Res. Opp. at 13. Respondent attempts to distinguish Petitioner's case from *Carranza-de Salinas*, 477 F.3d at 202, *Wilson*, 471 F.3d at 113, and *Restrepo v. McElroy*, 369 F.3d 480 (2nd Cir. 2004), respectively, where the time between the last conviction and the repeal of the statute was approximately 3 or 4 years. Respondent's contentions are without merit. Petitioner is not required to make an actual showing of reliance; rather, the proper inquiry is whether it would have been reasonable for him to rely on the availability of § 212(c) relief in waiting to affirmatively file for such relief. *See Hem*, 458 F.3d at 1199 (where the Court's finding of objective reliance turned on the fact that it *would have been reasonable* for Hem to forgo his right to appeal in reliance on the availability of § 212(c) relief, not whether he *actually relied* on the availability of such relief in forgoing the appeal).

Given that an applicant's equities are paramount in offsetting the severity of his crime, it is reasonable to presume that an applicant such as Petitioner, who was convicted of three counts of drug trafficking crimes, would desire to accumulate as many equities

as possible in order to increase his chances of success before bringing himself and his conviction to the attention of the authorities. The Respondent's assertion that "it is most reasonable to conclude that petitioner . . . was . . . simply hoping that the government would not try to remove him on account of his conviction on three counts of drug trafficking" (Res. Opp. at 13) is pure conjecture and, and even if true in fact, does not negate the objective reasonableness of an applicant delaying his affirmative application for many years for the purpose of accumulating sufficient equities to counterbalance his very serious offense. Furthermore, Respondent's contention that Petitioner could have affirmatively applied for § 212(c) relief after the effective date of AEDPA (Res. Opp. at 13) is without merit because it ignores the fact that AEDPA eliminated § 212(c) relief for persons deportable for controlled substance and aggravated felony offenses. *See* AEDPA § 440(d).

5. Finally, in attempting to rebut Petitioner's Equal Protection argument, Respondent conflates the *Landgraf* retroactivity analysis with the rational basis that the Constitution requires in order for the government to treat similarly situated persons differently. Res. Opp. at 13. As discussed at length in the petition, there is absolutely no rational basis for allowing aliens who accepted plea offers to retain eligibility to apply for § 212(c) relief, while denying the same eligibility to aliens who were convicted at trial. Cert. Pet. at 34-36.

CONCLUSION

For all the foregoing reasons, and for those presented in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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